Office - Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-2245 and 81-2276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF NEVADA,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,
v.
UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

BRIEF OF AMICUS CURIAE STATES IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE DEUKMEJIAN
Attorney General
of California
555 Capitol Mall
Sacramento, California 95814
(916) 445-4989

DAVID H. LEROY
Attorney General of Idaho
Room 210
State House
Boise, Idaho 83720
(208) 334-2400

MICHAEL T. GREELY
Attorney General of Montana
State Capitol
Helena, Montana 59620
(406) 721-5440

ROBERT O. WEFALD
Attorney General
of North Dakota
State Capitol
Bismarck, North Dakota
58505
(701) 224-2210

DAVE FROHNMAYER
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-6802

MARK MEIERHENRY
Attorney General
of South Dakota
State Capitol
Pierre, South Dakota 57501
(605) 773-3805

DAVID L. WILKINSON
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 533-5261

STEVEN F. FREUDENTHAL
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Mark White
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

WILSON - EPES PRINTING CO., INC.

QUESTION PRESENTED

Although the decision below involved other issues, this brief is limited to the following question:

> Whether in a comprehensive general water rights adjudication, claims must appear "adverse" on the face of the pleadings before the doctrine of *res judicata*/collateral estoppel can be asserted as a bar to relitigation of the same claims in a subsequent action.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI	1
REASONS FOR GRANTING THE WRIT	3
THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, IS EXPRESSLY CONTRARY TO DECISIONS REACHED BY OTHER CIRCUIT COURTS OF APPEAL AND IS ADVERSE TO THE INTERESTS OF SOUND PUBLIC POLICY	3
A. The Decision Below Conflicts with the Decisions of this Court	3
B. The Decision Below is Expressly Contrary to Decisions Reached by other Circuit Courts of Appeal	6
C. The Decision Below is Adverse to the Interests of Sound Public Policy	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Arizona v. California, 373 U.S. 546 (1963)	9
Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971)	4
California v. United States, 438 U.S. 645 (1978)	2
Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800 (1976)	9
Diamond Shamrock Corp. v. Lumbermans Casualty Co., 416 F.2d 707 (7th Cir. 1969)	7
Heckman v. United States, 224 U.S. 413 (1912)	6
Livesay Industries, Inc. v. Livesay Window Co., 202 F.2d 378 (5th Cir. 1953)	8
Morgan v. Udy, 79 P.2d 245 (Idaho 1938)	9
Montana v. United States, 440 U.S. 147 (1979)	4
National Bond Holders Corp. v. Seaboard C. Nt. Bank, 110 F.2d 138 (4th Cir. 1940)	8
Oldham v. Pritchett, 599 F.2d 274 (8th Cir. (1979)	7
Scooper-Dooper, Inc. v. Kraftco, 494 F.2d 840 (3d Cir. 1974)	7
United States v. California & Oregon Land Co., 192 U.S. 355 (1904)	6
United States v. District Court, County of Eagle, Colorado, 401 U.S. 520 (1971)	8, 9
United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev.)	2, 3, 5, 6
United States v. New Mexico, 438 U.S. 696 (1978)	2, 8

STATUTES	
Act of July 10, 1952, 66 Stat. 560, codified at 43 U.S.C. § 666 ("McCarren Amendment")	3

TEXTS	
1 B Moore, Federal Practice (2d ed. 1974)	3
Restatement of Judgments (1942)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-2245 and 81-2276

STATE OF NEVADA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondents.

BRIEF OF AMICUS CURIAE STATES IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICI

The Western States named herein as *amici curiae* have elaborate systems for determination and administration of water rights. It is the security afforded by these systems which has, in large part, made the West a productive and socially inhabitable region.

The federal government in settling and reclaiming the arid lands of the West has relied on these state adminis-

trative and judicial procedures. A basic tenent of the reclamation program has been its respect for Western water law. Recent decisions by this Court have reaffirmed that Western water development by the federal government must be carried out in conformity with state water laws. *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978).

An essential element of virtually every Western state system of water allocation is the comprehensive "general water rights adjudication." The general adjudication, as it is commonly called, provides a method whereby water users or state officials can initiate judicial proceedings to obtain a determination of the respective water rights of all water right holders on a particular water source. The only way to assure the effectiveness of a general adjudication is to join all potential claimants, require that each claimant assert all potential claims, and require that all parties be bound by the result.

There can be no doubt that the action initiated by the United States which finally resulted in the *Orr Ditch* decree was a general adjudication. It was brought to determine the relative rights of all party claimants in and to the waters of the Truckee River and its tributaries. The result was a final decree requiring that "all of the parties" to the *Orr Ditch* case and "all parties claiming by, through or under them," be enjoined from ever "claiming" any of the waters to which the decree pertained in a manner contrary to the decree. The United States submitted claims for water rights on behalf of the Paiute Indian Tribe which were included in the *Orr Ditch* decree. *United States v. Orr Ditch Water Co.*, Equity No. A-3 (Orr Ditch) Final Decree 87.

Despite the all encompassing nature of the action which led to the *Orr Ditch* decree and its unambiguous language, the Ninth Circuit determined that the United States and the Paiute Tribe are not precluded by the decree from asserting additional water rights on behalf of

the Tribe. The decision thereby negates the purpose of the *Orr Ditch* decree, and jeopardizes the settled water rights of hundreds of water right holders in the Truckee-Carson Irrigation District ("TCID") who have relied for nearly 40 years on the finality of the decree. More importantly, from the perspective of the *amici*, it casts a cloud of uncertainty upon numerous other decrees which have resulted from general adjudications throughout the West in which the United States has asserted water right claims on behalf of Indian tribes. The decision thus runs contrary to Congressional policy, as evidenced by the McCarren Amendment, 43 U.S.C. § 666, of providing the states with a means to bring finality and certainty to the claims of the federal government under the reservation doctrine. As a result, the *amici* feel compelled to urge this Court to grant the petitions of Nevada and TCID for writs of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT, IS EXPRESSLY CONTRARY TO DECISIONS REACHED BY OTHER CIRCUIT COURTS OF APPEAL AND IS ADVERSE TO THE INTERESTS OF SOUND PUBLIC POLICY.

A. The Decision Below Conflicts with the Decisions of this Court.

The purpose of *res judicata* is to insure finality of judgments and to protect against a multiplicity of lawsuits. 1 B *Moore*, Federal Practice 0.405[1] at 628 (2d ed. 1974); *Restatement of Judgments* §§ 1, 80 Comment b (1942). *Res judicata* makes a prior judgment binding in a second suit on the same cause of action between the same parties or their privies when the prior judgment was final and decided on the merits. The initial judgment determines every issue in the second suit which

was or could have been litigated in the initial suit. A related doctrine, collateral estoppel, specifically bars multiple litigation of the same issue.

This Court has recently had occasion to comment upon and summarize the principles of *res judicata* and collateral estoppel. In *Montana v. United States*, 440 U.S. 147 (1979), the Court stated:

> Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. [Citations omitted.] Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. [Citations omitted.] Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. [*Id.* at 153.]

The *Montana* decision reconfirmed this Court's departure from rigid limitations on the application of *res judicata*/collateral estoppel, which began in *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971). In that case, this Court rejected the rigid application of the test of "mutuality of estoppel" as a requirement for collateral estoppel. Subsequent decisions by this Court have further extended the doctrine to carry out the salutary purpose as expressed in the *Montana* case of:

> . . . preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate [and p]rotect[ing] their adversaries from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisons. [440 U.S. at 153-154; footnote deleted.]

The circumstances surrounding the litigation which resulted in the *Orr Ditch* decree clearly demonstrate that the decree represents a decision to which the principles of *res judicata* should apply. The amended complaint was drafted in comprehensive terms and, in the language of the district court decision, "was intended by all concerned, lawyers, litigants and judges, as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims" to the waters of the Truckee. As a result of this proceeding, the United States was awarded a reserved water right to approximately 30,000 acre feet of water for irrigation on reservation lands as trustee for the Pyramid Lake Paiute Tribe. The decree provided that "All of the parties to the . . . case" and "all parties claiming by, through, or under them," are enjoined from ever "claiming" any of the decreed water in a manner contrary to the decree. Final Decree, page 87.

The Ninth Circuit acknowledged that the *Orr Ditch* litigation constituted a comprehensive adjudication, expressly rejecting the Tribe's claim that the decree could bar relitigation of only those claims actually litigated. The Ninth Circuit also found that the cause of action in the present case was the same as the government asserted in *Orr Ditch*. Nevertheless, while finding that the Tribe was precluded from asserting an additional claim against the *Orr Ditch* defendants and their successors in interest, the Ninth Circuit held that the Tribe could assert the claim as against TCID. The court justified this distinction on the basis that there was no "adversity on the pleadings" between the Indians and TCID in the initial case. Such reasoning is contrary to this Court's recent decisions involving the doctrine of *res judicata* and demonstrates a misunderstanding of the general adjudication process, which, in the nature of a quiet title suit, makes adverse the claims of all potential water right holders.

When the United States brings a quiet title action, it must do so in all of its capacities, because the resulting judgment will be solemnized by the principle of *res judicata*. *United States v. California & Oregon Land Co.*, 192 U.S. 355 (1904). This rule was applied to the representation of Indian tribes by the United States in *Heckman v. United States*, 224 U.S. 413 (1912). There, this Court made clear that those who litigate in the same cause of action with the United States in its capacity as trustee for an Indian tribe do so with the assurance that the outcome of the litigation will be protected by *res judicata*. In *Heckman*, this Court stated:

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents [Indian tribes]. . . . Its efficacy does not depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress. . . .
>
> . . . [I]t must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. [*Id.* at 444-446.]

The ruling in *Heckman* is dispositive of the question of whether there was a full and fair opportunity to litigate the Indian water right claims in *Orr Ditch*. Given such an opportunity within the context of a general water right adjudication, it is manifestly contrary to the decisions of this Court to sanction a second chance by imposing highly technical requirement of "adversity on the pleadings."

B. The Decision Below is Expressly Contrary to Decisions Reached by other Circuit Courts of Appeal.

The Ninth Circuit's mechanical requirement of "adversity on the pleadings" is not only at odds with this Court's recent decisions, but is also in conflict with various circuit court decisions holding that parties who

were not formally adverse on the pleadings could be barred in later litigation between themselves. In *Diamond Shamrock Corp. v. Lumbermens Mut. Casualty Co.*, 416 F.2d 707 (7th Cir. 1969), Diamond, the casualty sufferer, and Fireman's, its fire insurer, sued Lumbermens as the underwriter of Diamond's general liability policy covering risks other than fire. Lumbermens sought Fireman's dismissal on the ground that it was not a proper party, since its lack of adversity with Diamond meant that Fireman's would not be bound by the judgment in any later action between it and Diamond. The Seventh Circuit reversed the trial court's dismissal order, stating:

> It is likewise clear that parties need not be arrayed as adversaries in the prior litigation and that formal issues need not be drawn between the parties to apply the doctrine [of collateral estoppel]. [*Id.* at 710.]

More recently, the Third Circuit Court of Appeals in *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840 (3d Cir. 1974), rejected formal adversity on the pleadings as a requirement for application of collateral estoppel. Therein the court stated:

> . . . [T]his Circuit's nulification of the mutuality requirement renders non-adversity irrelevant to the doctrine of collateral estoppel. In this Circuit, a total stranger to a prior litigation may, in a subsequent suit, estop a party from re-litigating a claim which he lost in the prior controversy, provided that the initial opportunity to present the claim was full and fair. We see no reason to treat a co-plaintiff more harshly than a total stranger. [*Id.* at 845; footnote deleted.]

This reasoning has also been followed by the Eighth Circuit, which has abandoned the requirement of "strict adv[e]rsity," which it recognized as outdated, being "the companion rule to 'mutuality'." *Oldham v. Pritchett*, 599 F.2d 274 (8th Cir. 1979).

Similar reasoning has been followed by the Fifth Circuit in *Livesay Industries Inc. v. Livesay Window Co.*, 202 F.2d 378 (5th Cir. 1953), and by the Fourth Circuit in *National Bond Holders Corp. v. Seaboard C. Nt. Bank*, 110 F.2d 138 (4th Cir. 1940).

These cases demonstrate the clear conflict between the Ninth Circuit's holding requiring strict adversity on the pleadings and the decisions of other circuit courts of appeal. Indeed, it appears that the Ninth Circuit's holding is unique in light of this Court's recent decisions clearly in line with the other circuit courts. This Court should exercise its discretion to review the Ninth Circuit's decision and reconfirm the application of the collateral estoppel/*res judicata* doctrines to a party having had a full, fair opportunity to litigate its claim.

C. The Decision Below is Adverse to the Interests of Sound Public Policy.

The implications of the Ninth Circuit's ruling in this case reach far beyond the potential claimants to water from the Truckee River. These individuals represent a mere fraction of the total number of parties which could be harmed if the Ninth Circuit's holding is allowed to stand, thereby paving the way for the reopening of scores of lawsuits throughout the West heretofore considered final.

The Ninth Circuit's inordinate emphasis on an outmoded procedural requirement ignores the fact that, in general adjudication proceedings, the United States must necessarily make claims on behalf of numerous parties. This necessity arises from the fact that the United States has vast land holdings which, in addition to the lands it holds as trustees for Indian tribes, comprise approximately half of the surface area of the western states. *United States v. New Mexico*, 438 U.S. 696, 699 n.3 (1978).

Numerous cases before this Court demonstrate the federal government's role in the general adjudication process. In *United States v. District Court, County of*

Eagle, Colorado, 401 U.S. 520 (1971), this Court noted that the United States asserted claims on behalf of the Bureau of Mines, the Bureau of Sport Fisheries & Wildlife, the Bureau of Land Management, the National Park Service and the Forest Service. In *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976), the United States asserted water rights for use on its own land and on behalf of its Indian wards. Another example of this multifaceted representation is *Arizona v. California*, 373 U.S. 546 (1963). There the United States asserted water right claims on behalf of five Indian reservations, national forests and national recreation and wildlife areas. This list is not exhaustive, only illustrative. The simple point is that such water right cases might very well again find their way to this Court if the Ninth Circuit's holding in the instant case is allowed to stand. At the very least, many would be subject to question by application of the rule established in the holding below.

The Ninth Circuit erred because it failed properly to recognize the nature of such general adjudication proceedings, which necessarily establishes mutual adversity among all parties involved. As the Idaho Supreme Court has stated:

> [I]t matters but little who are plaintiffs and who are defendents in the settlement of cases of this character, the real issue being who is first in right to the use of the waters in dispute. [*Morgan v. Udy*, 79 P.2d 245, 299 (Idaho 1938).]

This Court has recognized that "any order or action affecting one [water] right affects all such rights." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 811 (1976).

In favor of a discredited technical constraint, the Ninth Circuit's decision risks upsetting a decree relied upon for almost 40 years by the water users from the Truckee River. At the same time, the decision raises questions concerning many other such decrees where the

United States has represented multiple claims which must, by virtue of the nature of the proceeding, conflict.

CONCLUSION

In order to remedy what it perceived as a past injustice to the Tribe, the Ninth Circuit disregarded principles of *res judicata* and collateral estoppel as established by this Court and numerous circuit courts of appeal. The decision thereby inflicts an injustice on other water users of the Truckee River who have relied upon the binding effect of the *Orr Ditch* decree. At the same time, the decision brings into question numerous other decrees in general adjudications involving Indian water rights, and jeopardizes the use of general adjudications to bring finality and certainty to federal reserved rights claims, contrary to the express policy of Congress. Because of these implications, the *amici* urge this Court to grant the petitions of Nevada and TCID, and to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General
of California
555 Capitol Mall
Sacramento, California 95814
(916) 445-4989

DAVID H. LEROY
Attorney General of Idaho
Room 210
State House
Boise, Idaho 83720
(208) 334-2400

MICHAEL T. GREELY
Attorney General of Montana
State Capitol
Helena, Montana 59620
(406) 721-5440

ROBERT O. WEFALD
Attorney General
of North Dakota
State Capitol
Bismarck, North Dakota
58505
(701) 224-2210

DAVE FROHNMAYER
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-6802

MARK MEIERHENRY
Attorney General
of South Dakota
State Capitol
Pierre, South Dakota 57501
(605) 773-3805

DAVID L. WILKINSON
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 533-5261

STEVEN F. FREUDENTHAL
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Mark White
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711